

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.348 OF 1986

Kamlakar Shriniwas Chitlal & Ors. ..Appellants

Versus

Shri Vithal Bhau Taru ..Respondent

Mrs.S.S.Gokhale for appellants

Miss. Gauri Godse for respondent

CORAM : P.V.KAKADE, J.

DATE : 18TH OCTOBER, 2004

P.C.:

1. This is an appeal against the Judgment and Order passed by Addl. District Judge, Thane dismissing the appeal of the plaintiff and confirming the order passed by Joint Civil Judge, Kalyan dated 11.12.1985 dismissing the plaintiff's suit for possession of the suit property.

2. The plaintiff came with the case that the property bearing House No.95-A situated at CTS No.2271/A/1B Murbad Road, Kalyan, was originally owned by one C.B.Dugade. The said Dugade was residing at Bazar Peth Kalyan at a distance of about one mile from the said property house. Due to ill health and old age the person in the vicinity of the suit house had started making encroachment in the said property and said Dugade was unable to take any legal action due to his ill health. Hence he decided to sell the suit property and plaintiffs being the tenant in the said property, agreed to purchase the same and ultimately purchased it under the registered sale deed dated 13th December, 1975. It is the plaintiffs case that thereafter defendant made an encroachment in the southern portion of the said property and constructed "Tulsi Vrindavan" over the portion of about 2' x 2'. He also constructed a platform (Ota) in the southern portion of the said property and thus made an encroachment in respect of that Ota. Hence the plaintiff issued notice in September, 1976 and called upon the defendant to remove the said encroachment. The defendant replied the said notice and contended that the construction was existence for several years and refused to comply with the notice

and hence the suit for possession as well as damages came to be filed.

3. The defendant challenged the suit on various grounds and came with the case that he had become owner of the suit property by virtue of his adverse title. On such other grounds the suit was sought to be dismissed. The learned trial judge adjudicated the dispute and came to the conclusion that the plaintiff had not proved that he was entitled to possession, and defendant has proved his adverse title over the suit property. In the result the suit came to be dismissed. Appeal was carried in the District Court, Thane. The learned District Judge upheld the findings recorded by the Trial Judge and dismissed the appeal. Hence the present appeal.

4. At the outset it may be noted that at the time of admission the substantial question was raised to the effect that worshiping of Tulsi Vrindavan in another's land is being possession of that land or that the possession is adverse to the owner or is it only permission granted on religious grounds. With respects, after hearing both the sides and on perusal of the record, this so called substantial question of law

cannot be held to be question of law at all and therefore, the appeal should in fact be disposed of on that ground itself. However, the learned counsel for the appellant brought to my notice some important aspects which according to her are substantial questions of facts. It was submitted on behalf of the appellants that evidence on record was sufficient to show that there was no evidence to show that the defendant intended to encroach upon the adjacent property and therefore it cannot be said that he has perfected adverse title in the suit property. It was further submitted that the learned trial judge wrongly shifted the burden to prove this aspect on the plaintiff which in fact should have been the task of the defendant to establish with cogent evidence the factum of adverse possession. Thirdly it was submitted that the prerequisites of perfection of adverse title are not established on records, and therefore, on this ground the appeal is required to be allowed.

5. In this regard at the outset it must be noted, after hearing both the parties, that the issue in respect of adverse possession is essentially a question of fact and cannot be said to be a question of law, leave aside, the

substantial question of law by itself. Moreover, if we perused the judgment of the Lower Appellate Court, it is seen that the learned Judge has properly discussed the available evidence on record in order to come to the conclusion that the defendants' adverse title is established in due course. In the course of their arguments they took me through the pleadings as well as the evidence recorded at the trial stage, which is sufficient to show that the pleadings of the defendant are consistent with his evidence including the cross examination recorded at the trial stage. Moreover, the contents of the Sale Deed between the plaintiff and his predecessor in title is sufficiently clear to show that the predecessor in title of the plaintiff was very well aware of the encroachment made by person adjacent in the land including the defendant and still he had not taken any steps. The learned counsel for the appellant sought to put reliance on various rulings of the various Courts including the Supreme Court, the ratio of which culminates to the effect that a person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In the present case before us if we

perused the evidence on record it is seen therefrom that the defendant has come with clear case that he is in actual possession of the property for about 27 years prior to the filing of the suit to the knowledge of predecessor in title of the plaintiff, who owned the property atleast since the year 1934 and had never objected to use and possession of defendant over the said property. The very fact that the said Dugade has mentioned in his sale deed that the parties including the defendant have made encroachment upon his property clearly shows that it was to the knowledge of the predecessor in title of the plaintiff and therefore, there is no doubt whatsoever that all the parameters required to establish adverse title are found established on behalf of the defendant. The learned counsel for the appellant submitted that their evidence is conspicuously silent regard the animus to encroach upon the property. However, it must be noted that evidence regarding animus must differ from case to case and in the present set of circumstance, the animus is clearly established from the fact that the defendant, who is tenant in his own premises, has encroached upon the suit property to the knowledge of plaintiffs' predecessor in title and therefore, there is no doubt

whatsoever that it is established that the defendants' adverse title is duly proved.

6. In view of this aspect I do not see any merits in the said appeal and consequently the appeal stands dismissed under the circumstances no order as to costs.